



May 26, 1999

Mr. John Steiner  
Division Chief  
Law Department  
City of Austin  
P.O. Box 1546  
Austin, Texas 78767-1546

OR99-1463

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124689.

The City of Austin (the "city") received a request for information related to the bonding and technical services or surety support program for small, minority and women-owned businesses with which the city contracts on airport-related matters. A business entity, Bonding and Technical Services, Inc. ("BTS") has requested that the city withhold, as proprietary information, certain portions of the information responsive to the request. Therefore, you seek our determination as to whether those portions of the requested information may be withheld under section 552.110 of the Government code. Pursuant to section 552.305 of the code, this office notified BTS of the request and BTS has submitted arguments that portions of the requested information are protected from disclosure by section 552.110.

Section 552.110 provides an exception fro "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Copr. v. Huffines*, 314 S.W.2d. 763 (Tex), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from

other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. B (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup>

Commercial or financial information made confidential by statute or judicial decision is excepted from disclosure under the second prong of section 552.110. A recent decision of the third court of appeals ruled that in order for information to be withheld under the commercial or financial information prong section 552.110, the information at issue must be shown to be protected by a specific statute or judicial decision. *See Birnbaum v. Alliance of Am. Insurers*, Nos. 03-97-00660-CV & 03-98-002-8-CV, 1999 WL 314796 (Tex.App.-Austin, May 20, 1999, n.w.h.).<sup>2</sup>

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<sup>1</sup>These six factors are:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is know by employees and others involved in the [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

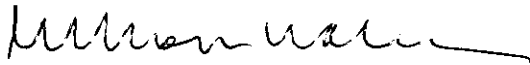
RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision No. 232 (1979).

<sup>2</sup>Prior to *Birnbaum*, this office had followed the standard for confidentiality of commercial or financial information set out in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C.Cir. 1974). *See* Open Records Decision No. 639 (1996).

BTS claims protection for portions of the requested information as both trade secret and confidential commercial or financial information under section 552.110. In our opinion, BTS has not made a *prima facie* case that any of the information at issue constitutes trade secrets. Nor has it established that the information is commercial or financial information made confidential by statute or judicial decision. Therefore, none of the information may be withheld under section 552.110. The information at issue must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in the request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely

A handwritten signature in black ink, appearing to read 'William Walker', followed by a horizontal line.

William Walker  
Assistant Attorney General  
Open Records Division

WMW/eaf

Ref: ID# 124689

encl. Submitted documents

cc: Mr. Calvin W. Stephens  
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(w/o enclosures)